(2)

No. 95-1574

Supreme Court, U.S.
FILED
APR 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ALTON & SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

JEROLD EDWARDS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

BRUCE N. COOK
Counsel of Record
HARRIET HOMSHER HAMILTON
COOK, SHEVLIN, YSURSA,
BRAUER & BARTHOLOMEW, LTD.
Attorneys for Respondent
12 West Lincoln Street
Belleville, Illinois 62220
(618) 235-3500

8741
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

	Page
Reasons for Denying the Writ	1
I. The circuit court properly granted a directed verdict on the application of, and violation of, the Boiler Inspection Act, and it should be affirmed.	1
II. Petitioner misconstrues the trial and appellate courts' rulings on causation and damages.	4
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

Angell v. Chesapeake & Ohio Railway Co., 618 F.2d 260 (4th Cir. 1980)	4
Ellis v. St. Louis S.W. Ry. Co., 193 Ill. App. 3d 357, 549 N.E. 2d 899 (5th Cir. 1990)	3
Laird v. Illinois Cent. Gulf Ry. Co., 208 Ill. App. 3d 51, 566 N.E. 2d 944 (5th Dist. 1991)	3
Lewis v. Norfolk & Western Ry. Co., 269 Ill. App. 3d 483, 646 N.E. 2d 1378 (5th Dist. 1995)	3
Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 N.E. 2d 504 (1967)	4

Contents

Page

Pinkham v. Maine Central R.R. Co., 874 F.2d 875 (1st Cir. 1989) 4

Shephard v. Missouri Pac. Ry. Co., No. 5-94-0479 3

Steer v. Burlington Northern Inc., 720 F.2d 975 (8th Cir. 1983) 4

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT PROPERLY GRANTED A DIRECTED VERDICT ON THE APPLICATION OF, AND VIOLATION OF, THE BOILER INSPECTION ACT, AND IT SHOULD BE AFFIRMED.

Petitioner suggests error occurred because the circuit and appellate courts did not afford some incidental inconsistencies extraordinary weight in comparison to the overwhelming evidence presented at trial which demonstrated its liability under the BIA. What petitioner largely disregarded are the substantive admissions made by their agents. The uncontroverted evidence presented at trial was that the petitioner had accepted liability for the incident until the seriousness of his injury became known. Petitioner raises some vague inferences about the timing of the inspections they claim are persuasive that there was never a stuck drawbar. (Pet. 17-20). Those tangential factors were simply dwarfed by their own documentation of the incident, wherein the railroad had reported the injury as having occurred when respondent freed a stuck drawbar. (R281). Moreover, at trial, the railroad's agents, including a locomotive engineer, acknowledged that drawbars stick due to a lack of grease, and such was a defect that could cause an injury! (R105, R311). Further testimony of the railroad's representatives was that the lack of documentation of a defect on the inspection report does not negate the determination that it was stuck, as only certain types of defects need be reported. (R613). Respondent's personnel file, and multiple insurance documents noted respondent was off work due to a personal injury on duty occurring on July 15, 1988. (R276, R281, R285). Petitioner's own report to their insurance company cited the cause of the injury as "moving a coupler on a diesel engine." (Pl. Exh. #9).

They paid for certain medical expenses shortly after the incident and would have paid more bills had they then been presented. (R297).

On the question of whether the BIA should apply, petitioner also attempts to divert this Court's attention from the very important evidence that the rail line was *not* "blue flagged" at the time of respondent's injury. (R424). This is compelling evidence that the line was "in use" as it reveals there were no repairs necessary. (R69).

Petitioner attacks respondent's credibility by arguing his testimony about the time of the incident (about 11:00 a.m.) conflicted with his statements that the injury occurred after he had completed his inspection. Such argument compels recollection of the song verse: "Does anybody really know what time it is? Does anybody really care?" The Appellate Court applied the common sense (aptly coined by the verse), that the moment in recorded time is not the focus of our being and memories. Errors in the estimation of "time" are inherently human. It is the events happening around us that allow us clarity of mind. The testimony and evidence was that with respect to the sequence of the events, and most specifically as to when the accident occurred in relation to his other duties, respondent was entirely consistent and uncontroverted. (R431, R502). The only reasonable conclusion was that the accident happened after he had completed his inspection.

Petitioner infers to this court that it was not given fair review by the Fifth District Appellate Court. What is clear from that court's opinion is that it carefully reviewed the trial record before it. Interestingly, petitioner invites this Court to use this case as a sort of referendum on the Fifth District of the Illinois Appellate Court. They highlight seven cases when that court purportedly either did not allow an issue to go to the jury or reversed a jury's

verdict. Notably, in doing so it appears they improperly cite *Shephard v. Missouri Pac. Ry. Co.*, No. 5-94-0479 (Pet. Brief p. 13), as plaintiff cannot locate such case in the official data bases. It may have been decided under Illinois Supreme Court Rule 23, but, as such, plaintiff is prevented from commenting upon the correctness of the reference made to it. That rule states such orders are not precedential and should not be cited, except for certain purposes of which the instant purpose is not included. Even if the cases was not cited as "precedent," *per se*, the rule requires that if the case is cited for one of the enumerated purposes a copy of the order should be furnished to other counsel and the court." This was not done.

The list they provide is not comprehensive in that it fails to recognize instances which show more balance to that court's treatment of FELA cases than petitioner's list implies. *See, e.g., Ellis v. St Louis S.W. Ry. Co.*, 193 Ill. App. 3d 357, 549 N.E. 2d 899 (5th Dist. 1990) (affirmed denial of plaintiff's motions for directed verdict, JNOV or new trial and affirming circuit court's refusal to instruct on railway's failure to provided a safe place to work); *Laird v. Illinois Cent. Gulf Ry. Co.*, 208 Ill. App. 3d 51, 566 N.E. 2d 944 (5th Dist. 1991) (affirming denial of motion for directed verdict for railroad and denial of plaintiff's JNOV motion on contributory negligence); *Lewis v. Norfolk & Western Ry Co.*, 269 Ill. App. 3d 483, 646 N.E. 2d 1378 (5th Dist. 1995) (answering certified questions of law that railroad not liable under FELA in the circumstances presented).

The other interesting thing about the list of cases cited is that it demonstrates that in two instances the Illinois Supreme Court has addressed those cases it determined were improperly decided. (Pet. Brief p. 13).

With respect to the applicability of the BIA, the question of whether the line was "in use" is a question of law for the courts.

Pinkham v. Maine Central R.R. Co., 874 F.2d 875 (1st Cir. 1989); *Steer v. Burlington Northern Inc.*, 720 F.2d 975 (8th Cir. 1983). Accordingly, it is improper to characterize that ruling of the circuit court as invading the province of the jury. In *Angell v. Chesapeake & Ohio Railway Co.*, 618 F.2d 260 (4th Cir. 1980) the court determined that the BIA applied in circumstances less compelling than the instant case. There, the court found the engine to be "in use" even when the track *was* "blue flagged" because then as here, the service and maintenance had been completed. Here, the court correctly found the rail line in use.

Concerning the violation of the act, petitioner would import a standard by which no verdict could be directed. The Fifth District Appellate Court affirmed the circuit court applying the appropriate standard required in *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E. 2d 504, 510 (1967) as follows: "when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

II.

PETITIONER MISCONSTRUES THE TRIAL AND APPELLATE COURTS' RULINGS ON CAUSATION AND DAMAGES.

Apparently, in order to incite this Court to respond, petitioner mischaracterizes the lower courts' orders with respect to causation. The trial court did not direct a verdict on causation and the appellate court did not rule that it had. (A-22). The jury was instructed in accordance with the proper Illinois Patterned Instructions that "plaintiff has the burden of proof with respect

to damages" and "whether any of the elements[1] of damages has been proved by the evidence was for them to decide." (A-23, R632-633, R896; I.P.I. No. 30.01). They were also instructed:

> The plaintiff claims he was injured and sustained damage while pushing a drawbar in the course of his employment at the railroad.
>
> The railroad denies that the plaintiff was injured or sustained damage to the extent claimed.

(A-23; R896).

It is clear from these instructions that the claimed error that the lower courts invaded the province of the jury (Def. Pet. pp. 21-22) is simply not true. As required by FELA, the jury — *and not the courts* — resolved the issue addressed in the petition of whether the drawbar incident caused the injuries claimed.

The suggestion that the issue was removed is extraordinarily disingenuous in that the trial court and respondent's counsel acknowledged the proximate cause issue remained, and encouraged petitioner to argue accordingly. (R773-776). In clarifying the issues, the statement was made to defense counsel in the jury instruction conference by the court, ". . . you can say he's not hurt. That's a valid argument that there is no proximate cause." (R776). In that context plaintiff's counsel further acknowledged: "And you can — if they don't believe he was hurt with a drawbar —then they shouldn't give any money." (R777).

---

1. The "elements" of damages submitted to the jury were: The aggravation of any preexisting ailment, disability and disfigurement, past and future pain and suffering, past and future lost wages and medical expenses. (A-22-23).

Petitioner's position that the cervical disc herniations were not caused by this incident was reasonably considered — and rejected — by the jury. Competent evidence was presented that demonstrated the drawbar incident caused the condition which necessitated the surgery and resulted in a permanent disability. As outlined by petitioner, respondent had been treated by a chiropractor, Dr. Stewart, and had even been treated the day prior to the incident. Petitioner's dissertation of the facts then fails to reveal that despite this respondent had taken *no* sick days in 1988 until this incident in July. (R274). Petitioner's safety director acknowledged that prior to the date of the incident respondent did not have the work record of a man who had a disc injury. (R273-74). Respondent's treating physicians testified to a reasonable degree of medical certainty that the drawbar incident caused the disc herniation. (Dr. Schoedinger depo.) Dr. Hogan was not a treating physician; he was their hired expert witness. Dr. Stewart candidly acknowledged he could not document his diagnosis of only a neuralgia prior to the drawbar incident with certainty because he did not have a CAT scan or MRI. (Def. Pet. pp. 21-22). ***When it suits them, petitioner would have a court supplant the jury's decision*** and accept their examiner's contradictory opinion which was subject to the same limited radiological evidence. It is more likely than not the jury distrusted Dr. Hogan's opinions for his lack of candor or other bias. Certainly *some* injury occurred on that date. The company doctor documented objective physical complaints on the date of the alleged injury. (R676, R678). The jury could have agreed with petitioner and minimized the verdict to `damages for a muscle strain. They did not.

The cause of the hernia was also before the jury. They resolved the question of whether a hernia which did not exist before the accident, and yet arose three days thereafter was sufficiently correlative. Notably, it was hardly a substantial element of damages and could not have significantly altered the outcome.

CONCLUSION

This is not a case where any injustice was done. As explained, it was a matter where petitioner had not contested its liability until it realized the significance of the damages. Their own initial assessment was merely demonstrated to be correct as a matter of law. The jury then resolved the matter of the damages caused by the injury. For the reasons stated, respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

BRUCE N. COOK
Counsel of Record
HARRIET HOMSHER HAMILTON
COOK, SHEVLIN, YSURSA,
BRAUER & BARTHOLOMEW, LTD.
Attorneys for Respondent
12 West Lincoln Street
Belleville, Illinois 62220
(618) 235-3500